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No. 596

In the Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES G. EMERLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 13) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1957. A petition for rehearing was denied on October 3, 1957. The petition for a writ of certiorari was filed on November 2, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether invoices passing from a subcontractor to a prime contractor in the circumstances of

case—where the prime contractor was under contract with the Government, and where both the subcontractor and the prime contractor knew that the invoices would be subject to Government scrutiny—were documents within the jurisdiction of a department or agency of the United States within the purview of 18 U. S. C. 1001.

2. Whether the trial court erred in its instructions to the jury.

STATUTE INVOLVED

18 U. S. C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner and Joseph Mary Ebeling were convicted in the United States District Court for the Eastern District of Missouri of (a) willfully making and using fal documents in a matter within the jurisdiction of a department of the United States in violation of 18 U. S. C. 1001 and (b) conspiracy to do so. Petitioner was sentenced to imprisonment for 12 months on each of eight substantive counts to run concurrently and fined $2,500 on the conspiracy count.

Charles Emerling, petitioner, was president of the Production Engineering and Manufacturing Co. (hereinafter referred to as "PEMCO"), and Joseph Mary Ebeling was manager of the Manchester Machine Co.

In May of 1951, PEMCO contracted with the Department of the Army Ordnance to produce mortar conversion kits (R. 20–21). The contract contained a price redetermination clause which required PEMCO to file with the Department of the Army a statement of its costs to produce the mortar conversion kits (R. 21).

In April of 1952, PEMCO executed three purchase orders to the Manchester Co. suggesting certain machine shop operations on "adapters," "housings," and "strikers" to be done for a total of $25,714 (R. 33–34). Ebeling, manager of the Manchester Co., then instructed one of his subordinates to prepare invoices indicating that the work ordered by PEMCO had been performed by the Manchester Co. (R. 60–62). The work, however, had not been done (R. 40, 55, 56, 65), and the subordinate, realizing this, refused to execute the invoices. Finally, after stating that "he had some deal with Charley Emerling", Ebeling made out the invoices himself (R. 61, 62).

The invoices were then presented to PEMCO, shipping tickets were made indicating that the adapters had been shipped from the Manchester Co. back to PEMCO, and the Manchester Co. received payment for this fictitious work by checks from PEMCO signed by petitioner.

In 1952 PEMCO caused a statement of the costs of production of the mortar conversion kits to be

prepared by certified public accountants (R. 58). These totals were incorporated in a statement of costs signed by Carl Emerling, executive vice-president of PEMCO and son of petitioner, and submitted to the Department of the Army, St. Louis Ordnance District on January 16, 1956 (R. 21, 47, 59).

Petitioner's conviction was unanimously affirmed by the Court of Appeals (Pet. App. 13).

ARGUMENT

1. Petitioner argues (Pet. 9, 10) that a document cannot be regarded as being within the jurisdiction of a department or agency of the United States under 18 U. S. C. 1001 when it passes from one individual to another and later becomes incorporated in another document which is presented by a third person to the governmental agency. Section 1001 does not, however, require that a false statement or document must itself have been presented to a department or agency of the United States. *United States* v. *Myers*, 131 F. Supp. 525 (N. D. Cal.). The only requirement is that the statement be made in a matter that is within the jurisdiction of such department or agency. This requirement has been construed to encompass any statement or document that was intended to be used in a matter within the jurisdiction of a department or agency of the United States. See *United States* v. *Leviton*, 193 F. 2d 848, 851 (C. A. 2), certiorari denied, 343 U. S. 946; *Nye & Nissen* v. *United States*, 168 F. 2d 846, 850-851 (C. A. 9), affirmed on other grounds, 336 U. S. 613; *United States* v. *White*, 69

F. Supp. 562, 564–565 (S. D. Cal.); *United States* v. *Myers*, 131 F. Supp. 525, 530 (N. D. Cal.); *United States* v. *Giarraputo*, 140 F. Supp. 831, 833, 834 (E. D. N. Y.); *United States* v. *Ganz*, 48 F. Supp. 323, 325 (D. Mass.).

In *United States* v. *Mellon*, 96 F. 2d 462 (C. A. 2), certiorari denied, 304 U. S. 586, a false application made to a local bank for a loan insured under the National Housing Act was held to be within the purview of 18 U. S. C. 1001, since the statements were in fact made to obtain a loan insured under the National Housing Act.[1] In the present case, petitioner was aware of the fact that his contract with the Government required the filing of a cost statement. Under instructions from the court, the jury was required to find that petitioner knew the invoices from the Manchester Co. were false, and they were also required to find that petitioner intended these false invoices to be incorporated in the cost statement to the Department of the Army. Thus the invoices did bear a relation to, by becoming a part of, the fraudulent cost statement which petitioner submitted; and because the invoices were false, they impaired the value of that cost statement, in violation of 18 U. S. C. 1001.

The case of *Lowe* v. *United States*, 141 F. 2d 1005 (C. A. 5), is not in point. In that case, the de-

[1] In *Terry* v. *United States*, 131 F. 2d 40 (C. A. 8), the defendant, in making his application to the local bank, did not do so with the intent of obtaining a loan under the National Housing Act and the bank was not dealing with the defendant upon that basis.

fendant presented a false claim to the payroll department of his employer, a private company. The company's contract with the Government provided that the company should be reimbursed from the United States Treasury for such payments. The court stated that merely because the employer was entitled to reimbursement was not sufficient to label an employee's payroll statements as a matter within the jurisdiction of a department or agency of the United States. There was, stressed the court, nothing to indicate to the employee the relationship that existed between his employer and the United States Government.

The case at hand is much different. Here the petitioner knew very well that his costs of manufacturing were subject to the scrutiny of the United States Government. Thus there is present in this case that which was lacking in order to prosecute successfully in the *Lowe* case—knowledge that the false statement was to be used in a matter within the jurisdiction of a department or agency of the United States.

2. The District Court charged:

"Before you can find the defendants guilty on either of the first eight counts of the indictment you must find the defendants, each knowingly and intentionally caused the invoice * * * to be made, and thereafter the defendant knowingly and intentionally caused the invoice to be used as an item of cost in executing the prime contract * * * with knowledge of its falsity, and knowingly and intentionally caused the invoice to be used as a sum going to make up the

total sum presented to the Army Ordnance * * * and that they intended and knew it was included in the figures presented to the government * * * *" (R. 97).

Petitioner contends (Pet. 8–9) that this instruction was erroneous in that it required the returning of a joint verdict only and thus deprived petitioner of the benefits of Rule 31 (b) of the Federal Rules of Criminal Procedure. The court further charged that "you must find the defendants, each knowingly and intentionally caused the invoice * * * to be made;" and "[t]hat defendant Ebeling or Emerling, separately, may have known an invoice to be a false writing is not enough to convict; it is necessary that you find the knowledge of falsity and intent as to use in a matter within the jurisdiction of the Department of the Army, Ordnance, be known and intended by both defendants, before you can convict on either of the first eight counts of the indictment" (R. 97). It is submitted that there was no prejudicial error in the charge as a whole.

If the charge cannot be interpreted as requiring separate verdicts, the only other interpretation can be that it required a finding of guilty against both defendants before either could be convicted. In order to convict both, the jury was required to find that each one individually was guilty of the crime; but they were prohibited from returning a verdict of guilty against either if one was found innocent. This placed a greater burden upon the prosecution. If anything, the petitioner was favored by such a charge.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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